

Wesco Ins. Co. v Nunez Dental Servs., P.C.

2025 NY Slip Op 33464(U)

September 15, 2025

Supreme Court, New York County

Docket Number: Index No. 155341/2021

Judge: Kathleen Waterman-Marshall

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. KATHLEEN WATERMAN-MARSHALL PART 31

Justice

-----X

WESCO INSURANCE COMPANY, TECHNOLOGY
INSURANCE COMPANY, INC.,

Plaintiff,

INDEX NO. 155341/2021

MOTION DATE 05/09/2024

MOTION SEQ. NO. 003

- v -

NUNEZ DENTAL SERVICES, P.C., MARITZA NUNEZ,
CAMILA DAVALOS, TOWER INSURANCE COPMANY,
MERRIMACK MUTAL FIRE INSURANCE COMPANY,

Defendant.

**DECISION + ORDER ON
MOTION**

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MERRIMACK MUTAL FIRE INSURANCE COMPANY

Plaintiff,

Third-Party
Index No. 595031/2022

-against-

NUNEZ DENTAL SERVICES, P.C., MARITZA NUNEZ,
CAMILA DAVALOS

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138

were read on this motion to/for DISCOVERY.

This matter was administratively transferred to Part 31.

Upon the foregoing documents, the motion by plaintiff Wesco Insurance Company and Technology Insurance Company (collectively “Wesco”) for an order, pursuant to CPLR 3124, compelling defendants Nunez Dental Services, P.C. and Maritza Nunez DDS (collectively “Nunez”) and Camila Davalos (“Ms. Davalos”) to respond to its March 6, 2024 First Notice For Discovery and Inspection, and to extend the time to file a note of issue, is granted. Upon the same record, the cross-motion by Ms. Davalos for a protective order pursuant to CPLR § 3103, is denied. Nunez has not appeared on either the motion or the cross-motion.

Background

I. Underlying Federal Action – Unauthorized Use of Image

Nunez operated a dental office and advertised its services using the likeness of Ms. Davalos in brochures, social media, posters, and other advertisements. Ms. Davalos, a model,

sued Nunez in federal court alleging, *inter alia*, that it used her likeness for years without her permission, including using images of Ms. Davalos in a way to make it appear that she was a customer or otherwise endorsed Nunez' dental practice. Nunez and Ms. Davalos resolved the federal action by way of a \$900,000 consent judgment.

II. Declaratory Judgment – Insurance Action

Wesco, which insured Nunez under certain commercial general liability insurance policies, brought this declaratory judgment action seeking a declaration that it owes no duty to defend or indemnify Nunez in the underlying federal court action. Wesco's complaint asserts three causes of action, each separately alleging that a condition precedent to coverage was not met, or an exclusion to coverage applies, and seeking a declaration that it owed no duty to defend or indemnify Nunez. The complaint alleges: 1. Nunez knowingly violated Ms. Davalos' rights; 2. Nunez' first publication of Ms. Davalos' image occurred before the policies incepted; and 3. Nunez' violation of Ms. Davalos' right to privacy is a non-covered criminal act. Wesco therefore alleges that it had no duty to defend or indemnify Nunez. As relevant to this motion, Ms. Davalos filed an answer with three counterclaims against Wesco for: 1. breach of insurance contract with Nunez; 2. declaratory judgment that Wesco owes a duty to defend and indemnify Nunez; and 3. the judgment amount pursuant to Insurance Law § 3420.

Shortly after a preliminary conference was held in this matter, and limited discovery was exchanged, Wesco moved for summary judgment on its second and third causes of action. Wesco argued that it did not owe a duty to defend or indemnify Nunez in the underlying federal action, as the first publication of the advertisements occurred before Wesco insured Nunez, and that Nunez' invasion of Ms. Davalos' privacy was an uninsured criminal act. Ms. Davalos cross-moved for summary judgment on all of her counterclaims, effectively seeking a declaration that Wesco was required to defend and indemnify Nunez in the underlying federal action. While their summary judgment motions were pending, counsel appeared for a compliance conference and advised that "no additional discovery is required in the case" (Justice Nock January 25, 2023 Compliance Conference Order). Approximately two weeks later, Justice Nock granted Wesco summary judgment, finding that it did not owe a duty to defend or indemnify Nunez, and denied Ms. Davalos summary judgment on her counterclaims (Justice Nock February 6, 2023 Decision and Order).

Thereafter, on March 5, 2024, the Appellate Division, First Department modified Justice Nock's decision, finding that Wesco's summary judgment motion should have been denied, and affirmed denial of Ms. Davalos' cross-motion (NYSCEF Doc. No. 112). The next day, March 6, 2024, Wesco served its First Notice For Discovery and Inspection on Ms. Davalos and Nunez seeking, *inter alia*, documents exchanged in the underlying federal action copies of the advertisements, communication related to the advertisements, and all documents related to any agreement to use Nunez' image. After Wesco's demand went unanswered, Justice Nock issued a discovery conference order directing Wesco to move to compel responses to its First Notice For Discovery and Inspection (NYSCEF Doc. No. 113). This motion and cross-motion followed.

III. Parties' Contentions

Wesco contends that Ms. Davalos and Nunez are required to respond to its First Notice For Discovery and Inspection. It contends that the Appellate Division, First Department's

decision remanded the matter for further proceedings and discovery. Furthermore, it argues that the discovery sought is material and relevant to this action now that the matter has been restored to active status by the Appellate Division, First Department's decision denying summary judgment.¹

Ms. Davalos contends that Wesco's demand is improper for several reasons. First, she contends that because the note of issue deadline has passed, Wesco's demand amounts to post-note discovery under 22 NYCRR § 202.21(d), which requires demonstration of both unusual or unanticipated circumstances and that the additional discovery is necessary to prevent substantial prejudice. She argues that the circumstances are not unusual, and the discovery sought is not necessary to prevent prejudice. Second, and relatedly, Ms. Davalos contends that Wesco was required to move to reopen discovery before serving its First Notice For Discovery and Inspection. Third, she contends that Wesco misrepresented the Appellate Division, First Department's decision; she alleges that the decision is silent regarding discovery and does not remand the matter for further discovery, as Wesco contends. Fourth, Ms. Davalos argues that Wesco waived any further discovery by filing its summary judgment motion before the note of issue deadline, as well as by representing that additional discovery was not needed at the January 25, 2023 court conference. Consequently, Ms. Davalos contends that she need not respond to the First Notice For Discovery and Inspection and that a protective order so stating should issue.

Nunez has not appeared on this motion.

Discussion

CPLR § 3101(a) directs that there “shall be full disclosure of all matter material and necessary to the prosecution or defense of an action, regardless of the burden of proof” (*Forman v Henkin*, 30 NY3d 656, 661 [2018]). The words “material and necessary” are interpreted liberally to include any facts which sharpen the issues and reduce prolixity; the test utilized is “one of usefulness and reason” (*id.* citing *Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]). These discovery obligations extend to “any things which are in the possession, custody or control of the party or person served” (CPLR 3120). CPLR § 3124 provides that a party seeking disclosure may move to compel compliance or a response if the responding party fails to respond or comply with a proper request, notice, interrogatory demand or question pursuant to Article 31 of the CPLR. However, “unsubstantiated bare allegations of relevancy are insufficient to establish the factual predicate regarding relevancy” (*Crazytown Furniture, Inc. v Brooklyn Union Gas Co.*, 150 AD2d 420, 420 [2d Dept 1989]). The “need for discovery must be balanced against any special burden to be borne by the opposing party” (*Kavanagh v Ogden Allied Maintenance Corp.*, 92 NY2d 952 [1998]).

Nevertheless, any party from whom or about whom discovery is sought may move for a protective order “denying, limiting, conditioning or regulating” the discovery demand under CPLR § 3103. “The burden of establishing any right to protection is on the party asserting it; the protection claimed must be narrowly construed” (*148 Magnolia, LLC v Merrimack Mut. Fire Ins. Co.*, 62 AD3d 486, 487 [1st Dept 2009]).

¹ The parties also dispute statements purportedly made by Justice Nock's Law Clerk at discovery conferences; however, the Court will not consider off-the-record statements. Thus, these arguments are omitted here.

I. Compel Disclosure

Wesco's First Notice For Discovery and Inspection generally seeks five categories of documents from Nunez and Ms. Davalos:

1. documents from the underlying federal action (including pleadings, exchanged discovery, transcripts, orders, etc.); and
2. contracts/agreements between Nunez and Johan Cardenas; and
3. documents related to Nunez' advertisements using Ms. Davalos' image, including the advertisements themselves; and
4. communication between Ms. Davalos and any other person regarding Nunez using Ms. Davalos' image; and
5. all other documents Ms. Davalos and Nunez intend to rely on in this action.

The requested discovery is material and necessary to Wesco's claims. The Appellate Division, First Department found "multiple issues of fact exist concerning Nunez' knowledge of whether Nunez had obtained the rights to use [Ms. Davalos'] image," which preclude summary judgment. Wesco's First Notice For Discovery and Inspection seeks documents related to Nunez' right to use Ms. Davalos' image, and Nunez' knowledge regarding this right, or lack thereof. Thus, these documents are discoverable. Similarly, documents from the underlying federal action are material and relevant to this declaratory action regarding insurance coverage for the underlying federal action. It is undisputed, as a general proposition, that documents which parties intend to rely on are likewise discoverable. Consequently, the First Notice for Discovery and Inspection seeks discovery which is material and necessary to this action, including the issue of facts identified by the First Department.²

However, the identity of Johan Cardenas is unclear, neither the parties' pleadings nor motion papers identify Mr. Cardenas. Without knowing the identity of Mr. Cardenas, the Court cannot determine whether the contracts or agreements between Nunez and Cardenas sought by Wesco are relevant to this action. Thus, the Court cannot compel disclosure of these documents, at this time.

Ms. Davalos' arguments against disclosure are unpersuasive. Her first two arguments against disclosure assume that a note of issue was filed; however, it was not. She cites no authority which stands for the proposition that 22 NYCRR § 202.21(d), the regulation addressing post-note discovery, applies where a note of issue has not been filed, and the cases she relies on are all factually inapposite – as notes of issue were filed in each of those matters (*see e.g. Schroeder v IESI NY Corp.*, 24 AD3d 180 [1st Dept 2005]; *S.A.B. Enters. v Village of Athens*, 178 AD2d 820 [3d Dept 1991]; *Francis v Board of Educ. of the City of Mt. Vernon*, 278 AD2d 449 [2d Dept 2000]; *Audiovox Corp. v Benyamini*, 265 AD2d 135 [2d Dept 2000]). Accordingly,

² Assuming, *arguendo*, that the Appellate Division, First Department's decision can be read to have denied declaratory judgment, Wesco did not seek summary judgment on its first cause of action, alleging that Nunez knowingly violated Ms. Davalos' rights. Thus, notwithstanding the Appellate Division, First Department's findings, as a matter of law, on summary judgment regarding Wesco's second and third causes of action, and denial of summary judgment on Ms. Davalos' counterclaims, there has been no judicial determination of Wesco's first cause of action. The material sought in Wesco's First Notice For Discovery and Inspection is material and relevant to Wesco's first cause of action, and is therefore discoverable.

22 NYCRR § 202.21(d) is not applicable here, where no note of issue was filed, and does not serve as a basis to deny Wesco's motion.

While Ms. Davalos is correct that Wesco's moving papers misstated that the Appellate Division, First Department remanded for further discovery – the decision is actually silent as to discovery – neither the misstatement nor the Appellate Division's decision bars disclosure. The Appellate Division made certain findings, as a matter of law, regarding Wesco's claims on summary judgment, but did not expressly remand the matter for further discovery. Having not passed upon additional discovery, the Appellate Division's decision does not militate in favor or against compelling additional discovery after it denied summary judgment to all parties.³

Ms. Davalos' final argument against disclosure is similarly unpersuasive. She contends that because counsel advised the Court at a compliance conference that additional discovery was not required, all further discovery is waived (January 25, 2023 compliance conference order). This argument fails to consider that summary judgment motions were still pending at the time of that conference, and that, by filing competing summary judgment motions, the parties each believed no further discovery was necessary for an award in their favor. Now that all parties' summary judgment motions have been denied, discovery is necessary before resolution of the claims. Ms. Davalos does not cite any authority which provides that discovery is waived under these circumstances.

II. Protective Order

There is no basis for a protective order here. The material sought by Wesco is relevant and necessary, and Ms. Davalos has not alleged that the material is privileged or otherwise immune from disclosure, only that the demand for the material is late or waived. As the demand is neither late nor waived, Ms. Davalos has not provided a sound basis for a protective order.

III. Note of Issue

Turning to the note of issue, the Court may extend the time to file a note of issue upon good cause and just terms pursuant to CPLR § 2004 (*see generally, Rozefort v Bronx Lebanon Hosp. Ctr.*, 191 AD3d 586 [1st Dept 2021]). “In considering a CPLR 2004 application to extend the time to file a note of issue, the Supreme Court can consider the length of the delay in making the application, the reason for the delay, and any prejudice to be caused to the opposing party” (*Oliver v Town of Hempstead*, 68 AD3d 1079 [2d Dept 2009]).

There has been little to no delay in this matter. Although a note of issue has yet to be filed, this is because Justice Nock's decision granting Wesco summary judgment disposed of the matter before a note of issue was required. It was only after the Appellate Division, First Department modified Justice Nock's decision that the matter was restored to active status. Wesco filed its First Notice For Discovery and Inspection the day after this matter was restored to active status and moved to extend the note of issue within two months. This is not a situation in which there was a lengthy delay following an appellate decision before a resumption of prosecution.

Consequently, under these circumstances, the note of issue deadline is extended.

³ To the extent that Wesco advised it moved to reargue the Appellate Division, First Department's decision, the outcome of that reargument motion is unknown; the parties have not provided a decision on reargument.

IV. Sanctions

Finally, the Court perceives no basis for sanctions against Wesco, as requested by Ms. Davalos. Wesco’s conduct in bringing this motion is not completely without merit in law so as to be frivolous under 22 NYCRR § 130-1.1 (see e.g. Newman v Berkowitz, 50 AD3d 479 [1st Dept 2008]). Indeed, the Court has granted the vast majority of the relief sought by Wesco.

Ms. Davalos’ request for sanctions is largely premised on a faulty assumption that 22 NYCRR § 202.21(d) – which governs vacatur of notes of issue – applies where no note of issue was filed. Ms. Davalos has not cited any authority to the contrary. Wesco’s misstatement regarding the Appellate Division’s decision does not rise to the level of a sanctionable materially false statement (22 NYCRR § 130-1.1[c]). Consequently, Ms. Davalos’ request for sanctions is denied.

Accordingly, it is

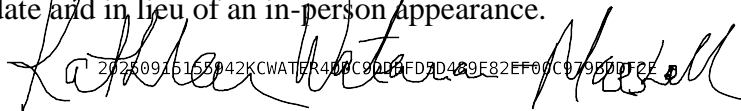
ORDERED that Wesco’s motion is granted without opposition, and on the merits, as against Nunez and on the merits as against Ms. Davalos to the extent that Nunez Dental Services, Martiza Nunez DDS, and Camila Davalos shall provide Wesco Insurance Company and Technology Insurance Company the following demanded documents by **October 24, 2025**:

- 1: documents from the underlying federal action; and
- 2. documents related to Nunez’ advertisements using Ms. Davalos’ image, including the advertisements themselves; and
- 3. communication between Ms. Davalos and any other person regarding Nunez using Ms. Davalos’ image; and
- 4. all other documents Ms. Davalos and Nunez intend to rely on in this action; and

it is further

ORDERED that the note of issue deadline is extended to January 30, 2026.; and it is further

ORDERED that a status conference is scheduled for **October 29, 2025 at 10:00am** in Courtroom 623 at 111 Centre Street New York, NY 10013. Counsel are reminded of the Part 31 Rules, available on the Court’s website, including those regarding the submission of a proposed conference order in advance of the conference date and in lieu of an in-person appearance.



9/15/2025

DATE

KATHLEEN WATERMAN-MARSHALL,
J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE